Office-Supreme Court, U.S.
FILED
JUN 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1759

In the Supreme Court of the United States

October Term, 1980

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

DUNCAN CERAMICS, INC.,
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

ROBERT POPPER
(Counsel of Record)
School of Law
University of Missouri-Kansas City
5100 Rockhill Road
Kansas City, Missouri 64110
(816) 276-1651

RONALD E. SANDHAUS
Attorneys for Petitioners

Of Counsel:
ROBERT G. CARTER
TREVOR C. CLEGG
DEAN A. BAILEY

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

No. 80-1759

In the Supreme Court of the United States

October Term, 1980

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

DUNCAN CERAMICS, INC.,
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

In its brief in opposition, the United States refers to the interlocutory nature of the review given by the Court of Appeals in this case. Devoting more than half of its brief to this point but refusing to formally bring the issue before the Court by a cross-petition, the government obfuscates the true importance of the case. The real thrust of the petition, as reflected in the questions presented, concerns the government's tactical ploy of bringing an accused to trial on a serious criminal charge solely on the decision or whim of the prosecutor, without any attempt to obtain the approval of a grand jury or a judicial officer.

The government relies on two reasons for not requesting review of the preliminary jurisdictional issue. Neither reason is substantial. The first is merely speculative; namely, that it is realistic to expect that the Ninth Circuit, in some future case, will reverse itself and limit pretrial appeals. (Brief in Opp., pp. 7-8). In fact, that court has been consistent in refusing to follow the government's suggestion to take an unduly restrictive approach to such appeals. *United States v. Yellow Freight, Inc.*, 637 F.2d 1248, 1250-52 (9th Cir. 1980) (right to indictment); see, *United States v. Wilson*, 639 F.2d 500 (9th Cir. 1981) (selective prosecution); *United States v. Griffin*, 617 F.2d 1342 (9th Cir. 1980) (vindictive prosecution). And the Ninth Circuit's position is consistent with this Court's precedent authorizing pre-trial appeals from final decisions under 28 U.S.C. § 1291. *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Abney v. United States*, 431 U.S. 651 (1977); *Stack v. Boyle*, 342 U.S. 1 (1951). Significantly, the government, when it deems it appropriate, invokes the procedure approved by the Ninth Circuit and presses its own interests through pre-trial appeals. See, *e.g.*, *United States v. Baker*, 603 F. 2d 759 (9th Cir. 1979).

The government also contends that other circuits differ with the Ninth and disallow pre-trial appeals. This is not so. See, *e.g.*, *In re Grand Jury Proceedings*, 636 F.2d 81, 83-84 (5th Cir. 1981) (reimbursement of costs of complying with grand jury subpoena); *In re Investigation Before February, 1977, Lynchburg Grand Jury*, 563 F.2d 652, 655-56 (4th Cir. 1977) (disqualification of specific attorneys from representing witnesses before grand jury); *United States v. Alessi*, 544 F.2d 1139 (2d Cir. 1976), cert. denied, 429 U.S. 960 (1976) (indictment in violation of earlier plea agreement); *United States v. King*, 482 F.2d 768, 770-73 (D.C. Cir. 1973) (accused's right to reopen preliminary hearing to call and examine complaining witness); *United*

States v. Doe, 455 F.2d 1270, 1272-74 (1st Cir. 1972) (propriety of federal grand jury obtaining evidence for use in trial pending in another district).

The second reason the government gives for failing to request review of the appealability issue is that the petitioners' underlying claims are ones that arise infrequently. (Brief in Opp., p. 8). This too is speculative. The government cites no statistics and points to no facts in support of its conclusion. The number of prosecutions brought against corporations without first obtaining an indictment or establishing probable cause is simply not known; and similar conduct by the government in future prosecutions cannot even be surmised.

For the foregoing reasons, the appealability issue is not one that can properly influence whether the petition should be granted. Instead, the underlying questions presented by the petitioners must be faced and evaluated.

The petition should be granted, and the writ of certiorari should issue.

Respectfully submitted,

ROBERT POPPER
(Counsel of Record)
School of Law
University of Missouri-Kansas City
5100 Rockhill Road
Kansas City, Missouri 64110
(816) 276-1651
RONALD E. SANDHAUS
Attorneys for Petitioners

Of Counsel:
ROBERT G. CARTER
TREVOR C. CLEGG
DEAN A. BAILEY

June, 1981